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IN THE

Supreme Court of the United States

April Term, 1942

No. 260

WILLIAM T. MUMFORDE, PETITIONER,

vs.

THE UNITED STATES OF AMERICA, RESPONDENT.

TRUE PETITION FOR WRIT OF CERTIORARI

GEORGE E. C. HAYES,
Attorney for Petitioner.

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WILLIAM T. MUMFORDE, PETITIONER,

vs.

THE UNITED STATES OF AMERICA, RESPONDENT.

TRUE PETITION FOR WRIT OF CERTIORARI

To the Honorable
The Chief Justice and the
Associate Justices of the Supreme Court
of the United States:

Your petitioner, William T. Mumforde, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia, rendered in the above captioned cause on June 29, 1942.

I.

OPINION OF COURT BELOW

The verdict of the jury in the District Court of the United States for the District of Columbia, that of "Guilty of murder in the First Degree" appears in the Record (p. 6) and the judgment of the Court, based upon said verdict, was the compulsory imposition of the death penalty (R. p. 7, 8) by electrocution, the date of which was fixed for October 17, 1941; and which said date for execution has been carried forward by appropriate Orders for the allowance of time for the affecting of an appeal and for such additional steps as to date have shown themselves to be necessary.

The Opinion of the United States Court of Appeals for the District of Columbia, No. 7992, decided June 29, 1942, not yet in volume form, appears in the Record on pp. 54-58.

II.

JURISDICTION

The jurisdiction to review this cause by writ of certiorari is conferred upon this Court by Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C. A., Title 28, Section 347(a)).

III.

SUMMARY STATEMENT

Petitioner, appellant below, was convicted of murder on an indictment charging in a single count the offense of murder in the first degree in the killing of one Fannie Cohen by shooting while in the perpetration of a felony (robbery). The killing occurred in the District of Columbia on the 15th day of February, 1941. Petitioner fled to North Carolina, was arrested there, and brought back to the District of Columbia the latter part of March following.

SPECIFICATION OF ERRORS

The Court below erred:

(1) In holding that the testimony of the defendant, petitioner here, was not sufficient to show an abandonment of the robbery originally planned.

(2) In not holding that since the defendant had abandoned the enterprise upon which he had set out that the killing did not occur *while* the defendant was perpetrating a felony and that consequently the defendant was not guilty under the indictment as drawn.

(3) In not holding that the Justice in the District Court of the United States for the District of Columbia erred in including in his instructions to the jury the possibility of second degree murder and manslaughter as verdicts under the indictment as drawn and the evidence as adduced.

(4) In not holding that the Justice in the District Court of the United States for the District of Columbia erred in not so defining the material elements in the lesser degrees of homicide (second degree murder and manslaughter), as would enable the jury to intelligently include same in their deliberations.

(5) In taking the position that its own decision in the case of Roy Lee Wood and Fred M. Wolf vs. United States of America (No. 7863) — App. D. C. —, — Fed. 2nd —, was not controlling as to error committed in accepting in evidence a statement made to the United States Commissioner sitting as a Committing Magistrate at the time of the first arraignment of the defendant, at a time when defendant was without counsel.

QUESTIONS PRESENTED

(1) Under the indictment as drawn was it proper to charge as to lesser offenses? If so, should not the detailed requirement of each be covered in granted prayers or the charge by the Court?

(2) Is there any real distinction between cases involving the incorrectness of the allowance in evidence of a plea interposed before a Judge or Commissioner sitting as a committing magistrate, when defendant is without counsel, when on the one hand the plea is one of "Guilty" and on the other where the Commissioner, interpreting language of the defendant, when so arraigned without counsel, enters a plea of "Not Guilty" for the defendant; the statement then made being allowed in evidence and being tantamount to a plea of "Guilty;" it being remembered in this connection that a plea of "Guilty" of murder in the first degree could not be allowed to stand.

DISCUSSION

1. The Government in this case elected to stand on an indictment drawn in one count alleging first degree murder in that the defendant killed one Fannie Cohen while engaged in the perpetration of a felony (robbery). The occurrences upon which the indictment was based took place on February 15, 1941. In June, 1940, Congress, at the request of the Attorney General, amended the then existing law in the District of Columbia so as to avoid the necessity of proof that a killing while a felony was being committed was done "purposely" as had previously been required to raise the offense to first degree murder. Under this amendment the offense was first degree murder where the killing occurred while a felony was being committed even when the killing was "without purpose so to do." The election of the Government to stand on the indictment as

drawn was obviously based upon its knowledge of what evidence was available to it; and the reasoning was no doubt indulged in that here was a cause where full reliance could be had upon the fact that under the amended law the evidence would justify a first degree verdict. It is indeed a fact that in the trial court and the appellate court as well Government counsel took full responsibility for the drawing of the indictment in one count and agreed with the point then raised by counsel for the defense that under the evidence as adduced and the indictment as drawn the defendant was guilty of murder in the first degree or entitled to an acquittal. Though not objected to by counsel for the Government, the Trial Justice refused to grant defendant's Prayer No. 1 (R. p. 46) embracing this theory and this we allege was error; as we respectfully submit the Appellate Court was likewise in error in not reversing the Trial Justice for his failure to grant this prayer. The Appellate Court, emphasizing the fact that Prayer IIa of the defendant (R. pp. 46, 47) was offered by the defendant and granted by the Court, says that "it was wholly favorable to the defendant and he cannot complain." The record discloses that this synthetic prayer was made up only after the denials of defendant's Prayer No. 1 and No. 2; and we cannot concede the allowed prayer as favorable when these denials are taken into consideration. Admittedly the defendant, through his counsel, was seeking to obtain the instructions most advantageous to him but we are definitely of the opinion that the jury's reaction might have been a different one had the clear cut issue been before them of whether or not the defendant was guilty of murder in the first degree rather than to have had them confused by prayers, shown to be supplementally agreed upon, incompletely stating the law, and without supplement or explanation by charge of the Court. Believing the defendant so entitled we believe that he was prejudiced by the failure of the Court to grant defendant's Prayer No. 1 (R. p. 46). We feel that the Court also erred in the trial of the cause,

after its indication of unwillingness to follow the theory advanced by the defendant in his proffer of Prayer No. 1 in failing to charge the jury in unmistakable terms as to the lesser offenses which they might find, as well as the possible verdict of "not guilty"; and the Appellate Court erred in failing to find the allowed prayers and the charge insufficient explanation of the law involved. Although this was a first degree murder case, the record discloses no other basis for the grounds of the finding of a degree less than first degree murder except the defendant's Prayer No. IIa as granted, with the incompleteness there evidenced, yet the Court in its charge to the jury stated (R. p. 49) that the law of the case had been substantially covered in the law read by respective counsel and specifically that the definition of malice aforethought was properly covered in counsel's statement; attempting in no wise to explain what degree of homicide malice aforethought had to do with, and making no explanation as to the legal essentials of murder in the first degree as relied on in the Government's indictment, nor of murder in the second degree, nor manslaughter; nor as to the conditions under which under the evidence as adduced they might properly find the defendant "not guilty." It is respectfully urged in this latter regard that it is not sufficient for the Court, as in the instant case, to say to the jury (R. p. 50): "There are four verdicts possible in this case; a verdict of murder in the first degree, murder in the second degree, manslaughter, and not guilty. You may retire and consider your verdict."

2. Equally if not more fundamental in this matter of the allowance of a writ of certiorari is the inconsistent position taken by the United States Court of Appeals for the District of Columbia in the instant case from the position taken by it in the case of Roy Lee Wood and Fred M. Wolf vs. United States of America, No. 7863, decided March 9, 1942. It is respectfully urged that in spite of the attempted differentiation between the two cases the decisions in the

Roy Lee Wood and Fred M. Wolf vs. United States of America case, Court of Appeals No. 7863 and in the instant case, William T. Mumforde vs. United States of America, Court of Appeals No. 7992 are diametrically opposed to each other and will leave this jurisdiction in hopeless confusion unless reviewed by this Court for the purpose of interpreting what the respective cases hold and to announce what the true holding should be. We find it impossible to reconcile the reasoning indulged in in the Wood and Wolf case with the suggested lack of applicability to the instant case and the distinctions attempted to be made. There is no question but that, at a time when he was not represented by counsel, in answer to a question by the United States Commissioner as to how he pleaded, the defendant stated as follows: "I am not guilty of premeditated murder, but I am guilty of the shooting in an attempt to rob the woman and shooting her" (R. p. 35). Reference need only be had to the indictment coupled with knowledge of the existing law in this jurisdiction as to first degree murder being a perpetrated offense when a killing occurs while a felony is being committed with or without purpose for one to immediately realize that when the defendant said "I am guilty of the shooting in an attempt to rob the woman and shooting her" he was pleading guilty more effectively than he possibly could have even by the use of the word itself. It is for this reason, mindful as we are that the Commissioner, under whatever conditions, would technically enter a plea of "Not Guilty" to a first degree murder charge, that we find ourselves unable to follow the reasoning of the Appellate Court in the instant case when it says: "But in this case the plea entered by the Commissioner was 'not guilty,' *which of itself distinguishes the cases*" (Italics ours) (R. p. 57). Going on in the distinguishing features given as a reason for not following the Wood and Wolf case, the Court says: (R. p. 57)

> "It is true that witnesses who were present at the hearing before the United States Commissioner the day following the taking of appellant's written confession were allowed to testify that when the charge of murder in the first degree was read to appellant and he was asked to plead, he answered that he was guilty of robbing and shooting, but that it was not premeditated or that he had not committed premeditated murder. *So far as we can determine the statement, as it was made, was wholly voluntary and is different from the statement in the Wood case, which was, guilty as charged.*" (Italics ours).

In setting up this alleged difference the Court would not seem to have been mindful of its own language in the Wood and Wolf case when it said:

> "It is sufficient to rule that when, as here, the accused is without counsel and it does not appear clearly that he knows his rights and intends to waive them, the 'plea' or *its substantial equivalent, made without warning or advice, cannot be received in evidence against him.*"

Was the above language of the defendant when called upon to plead "wholly voluntary" or was it the "substantial equivalent" of a plea and consequently not receivable in evidence against him. And again, the emphasis here put by the Court upon the reply to the question put by the Commissioner seems to entirely abandon what we felt we had a right to accept as the cogent reasoning in the Wood and Wolf case that the error was in the asking of the question, made apparently, as it developed, for testimonial or evidentiary purposes without warning. No language could better rebut the language of the Court as above stated in the instant case than the language of the same Court in the Wood and Wolf case from which we again quote:

> "If the matter involves, as we think, not only the personal rights and protection of the accused, but also the court's integrity as a court, there is no room for waiver regardless of the state of knowledge with which he responds. *The abuse of the court's position is in the asking of the question. It is not relieved by the character of the reply. The abuse is clear and complete when the court, whether magistrate or trial tribunal, makes the inquiry for testimonial or evidentiary purposes without warning. That the accused may happen to respond with knowledge does not denude the inquiry of its original unfairness.*" (Italics ours).

One needs but read the opinion in the Wood and Wolf case and the authorities upon which reliance is had and follow the attempted distinctions as there ironed out between the admitted inability of the offering of a plea of guilty at time of arraignment, Kercheval vs. United States, 274 U. S. 220 and Heim vs. United States, 47 App. D. C. 485, and the asserted distinction in the case of United States vs. Adelman, 107 Fed. (2d) 497, and the different point of reliance of the defendants in that case to have ample authority for the position here urged. The Court there significantly said:

> "They say the preliminary hearing is a judicial inquiry and constitutes a stage or step in the proceedings which finally determine their guilt or innocence. Accordingly, it is said, the constitutional guaranties against self-incrimination and of the right to counsel apply to it and were violated. Hence, they argue, the pleas were obtained illegally and were not admissible."

We adopt this very position and depend upon the supportive authorities cited by those defendants and incorporated by the Court in its decision—Johnson vs. Zerbst, 304 U. S. 458 (1938) and Powell vs. Alabama, 287 U. S. 45 (1932).

Nor we submit is it any answer to the inconsisent positions taken by the Court in these two cases that at another

time the defendant had made a confession to the police of similar import. It is to be noted that in the Wood and Wolf case comment was had in the opinion upon the fact that "the arresting officer, Bean, testified they confessed to him and the victim identified them in his presence within three days after the crime." These factors were not allowed in the Wood and Wolf case to override the violation of the defendants' constitutional guaranties against self-incrimination and the right to counsel; nor should similar factors be allowed so to do in the instant case.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

1. This Court should review this case for the purpose of enunciating a doctrine as to the requirement or lack of requirement upon the Court to charge a jury as to lesser homicide offenses upon evidence as adduced in this case based upon an indictment in one count charging murder in the first degree because of a killing while perpetrating a felony; with a suggestion as to the detailed requirements as to prayers granted or charge given to cover the law involved.

2. The opinion in the instant case is diametrically opposed in its reasoning to the opinion in the Wood and Wolf case, a recent decision by the same tribunal, and the result can but be a confusion which this Court should correct.

3. The constitutional rights of the defendant to be exempt from self-incrimination and to be entitled to counsel at all stages of the proceeding as a necessary requisite of due process of law have been violated and can only be corrected by the allowance of the writ of certiorari and a decision protective of such rights.

Respectfully submitted,

GEORGE E. C. HAYES,
Attorney for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 260

WILLIAM T. MUMFORDE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia (R. 54–58) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered June 29, 1942 (R. 59). The petition for a writ of certiorari was filed July 28, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (R. 2), See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether in a trial for first-degree murder the court committed reversible error in instructing the jury that it might find the defendant guilty of the lesser offenses of second-degree murder or manslaughter, when the instruction was given at his request and the jury found him guilty of first-degree murder.

2. Whether prejudicial error resulted from the admission in evidence, without objection, of testimony as to an incriminating statement made by petitioner at his preliminary hearing before a United States Commissioner.

STATUTE INVOLVED

The Code of the District of Columbia, 1940 Ed., Title 22, c. 24 (Act of March 3, 1901, c. 854, 31 Stat. 1321, as amended by the Act of June 12, 1940, c. 339, 54 Stat. 347) provides as follows:

> § 22–2401 [6:21]. *Murder in the first degree—Purposeful killing—Killing while perpetrating certain crimes.*
>
> Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in section 22–401 or

22–402 of this Code, rape, mayhem, robbery, or kidnapping, or in perpetrating or in attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree.

STATEMENT

Petitioner was convicted (R. 6) in the United States District Court for the District of Columbia on a one-count indictment (R. 5–6) charging the unlawful killing of one Fannie Cohen while attempting to perpetrate a robbery, and was sentenced to death by electrocution (R. 7–8), which is mandatory (D. C. Code, Sec. 22–2404).

It is not disputed that at about 10:30 on the night of February 15, 1941, petitioner, armed with a 38-caliber revolver, entered the dress shop of Fannie Cohen at 1512 U Street Northwest, in the District of Columbia, with the intention of committing a robbery; that the woman saw him and walked toward him and screamed; that he pulled the gun from his overcoat pocket and shot her; that she fell to the floor at his feet and he fled; and that she was pronounced dead ten minutes later (R. 29–31, 35, 38–41).

Petitioner testified that after entering the shop he abandoned his intention to rob and that when the woman screamed he pulled the gun "with the intention of stopping her screaming * * * and as I snatched the gun it went off" (R. 38).

An eyewitness to the crime testified that after the woman fell petitioner "reached over her body and grabbed at something" before he turned and fled. (R. 11).

ARGUMENT

I

Petitioner contends that he was entitled to acquittal unless he was guilty of murder in the first degree, for both the indictment and the proof precluded any possibility of his being convicted of anything less, and that therefore the court erred in charging the jury as to the lesser offenses of second-degree murder and manslaughter (Pet. 5).

It should first be noted, however, that it was petitioner, "seeking to obtain the instructions most advantageous to him" (Pet. 5), who advanced the theory that the jury might also bring in a verdict of second-degree murder[1] or of manslaughter (R. 46–47).[2] Hence, he is in no position to complain of the instruction. Cf. *Matheson* v. *United States,*

[1] The indictment would have supported a verdict of second-degree murder (*Owens* v. *United States*, 58 F. (2d) 684, 685 (App. D. C.), certiorari denied, 299 U. S. 540) if the killing had been with malice after the intent to rob had been abandoned, for section 22–2403 of the D. C. Code provides that "Whoever with malice aforethought" commits any homicide not defined as first-degree murder, "is guilty of murder in the second degree."

[2] An instruction precluding a verdict of manslaughter might have furnished grounds for reversal of the conviction. Cf. *Kinard* v. *United States*, 96 F. (2d) 522, 525 (App. D. C.).

227 U. S. 540, 543; *Wells* v. *United States,* 257 Fed. 605, 619–620 (C. C. A. 9); *Horn* v. *United States,* 182 Fed. 721, 738 (C. C. A. 8), certiorari denied, 219 U. S. 585. Furthermore, whether the charge as to lesser offenses should have been given has now become a purely theoretical question. Petitioner admitted at the trial that he entered the store with the intent to rob, and that he shot the deceased (R. 39–40). The only question for the jury was whether to believe his explanation that he had abandoned his original intention when the shot was fired and that the killing was accidental. This issue was sufficiently presented to the jury in the instruction complained of (R. 46–47), and the jury's refusal to accept his version was fully warranted in view of his previous admissions (see pp. 7–10, *infra*), and the testimony of the eyewitness to the crime. In other words, the jury, in response to the indictment and upon ample proof, has found petitioner guilty of first-degree murder, and nothing in the instructions complained of could have influenced that verdict. On the contrary, in view of the overwhelming evidence of his guilt of first-degree murder, the instruction as to lesser offenses was, as the court of appeals held, "wholly favorable to the defendant" (R. 57). Cf. *Sparf and Hansen* v. *United States,* 156 U. S. 51, 64.[3]

[3] Petitioner questions the adequacy of the definition of malice aforethought (Pet. 6), but since the record does not contain the summations of counsel there is nothing to contradict the trial court's conclusion—unchallenged at the trial—

II

Petitioner also contends that prejudicial error resulted from the admission in evidence of testimony as to an incriminating statement which he made to the United States Commissioner at his preliminary hearing, when he was not represented by counsel. The statement was to the effect that petitioner was not guilty of premeditated murder but of shooting the woman in an attempt to rob her (Pet. 6–10).

However, no objection was made to the admission of this testimony. Hence, even if it could be said that the statement was made under judicial "pressure,"[4] as was held in *Wood* v. *United*

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that "malice aforethought was properly defined by counsel" in summation to the jury (R. 49). He also asserts that the court failed to instruct as to "the possible verdict of 'not guilty'" (Pet. 6), but this claim is not borne out by the record. Such instructions were incorporated in petitioner's granted prayer No. 8, which his counsel read to the jury (R. 48) and which was supplemented by the court's subsequent instructions (R. 49–50), and petitioner requested no further enlargement thereof.

[4] It was pointed out in the Government's brief in the court below (pp. 6–7) that the charge to which petitioner was asked to plead at the preliminary hearing was that he killed the deceased with "deliberate and premeditated malice," and that following his statement a plea of "not guilty as charged" was entered. This is not shown in the record because petitioner did not question the admissibility of the testimony at the trial. One witness testified that petitioner said, "I am not guilty of premeditated murder, but I am guilty of the shooting in an attempt to rob the woman and shooting her" (R. 35); another testified that petitioner "said he was guilty of robbing and the shooting, but it was not premeditated"

States, 128 F. (2d) 265, 274 (App. D. C.), upon which petitioner relies (Pet. 6–10), he must, under the dictum of that case, be deemed to have waived the privilege against self-incrimination by his "failure to object when the plea [was] tendered in proof" (128 F. (2d) at p. 275). Moreover, as the court below held, it was "purely cumulative" (R. 58) of other admissions by petitioner, even more incriminating, which had already been received in evidence without objection. Thus Government witness Meyers testified that on the night of the shooting, in a cafe located a few blocks from the scene of the crime, petitioner told him that "he had shot the lady around there at the dress shop" (R. 20), and that, about two months later, at Police Headquarters, he heard petitioner state that "he went in there for money and that the reason he shot her was that she started to scream" (R. 21). Government witness Tolson, a police officer, testified that on March 25, 1941, while he was returning petitioner to the District from Rockingham, North Carolina, petitioner stated that:

> he did not mean to kill her, that he only went in there to get some easy money * * * that he had this gun on him and

(R. 36); and still another testified that petitioner stated, "I am guilty of attempting to rob her and of shooting her, but not a premeditated murder" (R. 37). Petitioner himself testified that "I told him [the Commissioner] I refused to plead guilty to the first degree because that would necessitate premeditation" (R. 43).

> was walking down the street looking for a place to hold up to get some easy money, and that this dress shop was the first place he came to that looked easy * * * that when he went into this store, this woman was about six feet from him out in the front of the counter, and that he had the gun in his right-hand coat pocket, with his hand on the handle of the gun, and that as he got all the way inside the door this woman started to scream and started to walk towards him * * * that he pulled the gun out and fired one shot and the woman fell to the floor, and he bent over her to go through her pockets, and then he started to run * * * that the reason he denied the charge in Rockingham was because he thought the fact that he had killed a white woman would cause them to lynch him, and that he wanted to get out of the state before telling the truth about it" (R. 26–27).

Tolson testified further that on the evening of March 26, 1941, at Police Headquarters, petitioner

> put on the reversible coat, put the gun in his right-hand pocket and demonstrated * * * how he walked in the store, pulled the gun, and fired the one shot

and that petitioner stated "I went in to rob the place, but I didn't mean to kill the woman" (R. 34). Tolson also identified a typewritten statement, signed by petitioner, dated March 26, 1941, and in which petitioner stated, *inter alia,* that:

I walked in the place and I had my hand in my overcoat pocket on the gun. When I went in there I had the intentions of going to get some money. When I walked in the lady I shot was standing about as far as from here to the radiator [indicating a distance of about six feet] she was not behind the counter. Just as I got inside the door she started toward the door screaming. I pulled my gun and fired one shot at her. I fired once. She fell right down at my feet. I bent down and started to go to her pockets, then I broke and ran out the door (R. 29–30).

* * * * *

She was walking toward me screaming. I think she was trying to get out the door where I was standing (R. 31).

* * * * *

Q. What part of her body did you aim for?

A. I didn't fire at any particular place. I just pulled the gun and fired toward her (R. 31).

* * * * *

Q. Why did you take this gun?

A. Well, I was not working, I didn't have no place to stay and I didn't have no money and I thought I'd use it to get me some easy money (R. 31).

In addition to the foregoing, petitioner testified at the trial that he went into the store because "I had the intention of robbing the place"; that

"after getting into the store I immediately decided to drop the whole idea and come out," at which time the deceased "was coming from the back of the place" (R. 39); that he pulled out the gun "when she started screaming" because "I thought by pulling the gun out she would stop screaming, that I would frighten her and she would stop screaming," and that "in snatching the gun the gun went off" (R. 40).

Accordingly, it is clear that, as the court below stated, the testimony now objected to "added nothing prejudicially" to the incriminating admissions theretofore received without objection "or indeed to the evidence given by the accused at the trial" (R. 58); and it can hardly be said, as was said in the *Wood* case, that it "may have clinched the case" against petitioner, 128 F. (2d) at p. 267.[5] As the same court declared in *Guy* v. *United States,* 107 F. (2d) 288, 290, "When guilt is clearly established by competent evidence, error in the admission or exclusion of other evidence * * * which does

[5] In any event, even if the decisions in the two cases were "diametrically opposed to each other," as petitioner asserts (Pet. 7), that would not warrant review by this Court, for "conflict or inconsistency between decisions of the same Circuit Court of Appeals ordinarily is not a ground for a writ, since the later in point of time is controlling." (Robertson and Kirkham, *Jurisdiction of the Supreme Court of the* United States, p. 619, and see p. 675).

not affect the substantial rights of the accused does not call for the reversal of a conviction."[6]

CONCLUSION

The decision below is correct. There is no conflict of decisions warranting review by this Court; nor is any question of general importance involved. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.

WENDELL BERGE,
Assistant Attorney General.

OSCAR A. PROVOST,
ANDREW F. OEHMANN,
Attorneys.

AUGUST 1942.

[6] Petitioner assigns as error (Pet. 3), but does not argue, that the court below should have held that the evidence was "sufficient to show an abandonment of the robbery originally planned" and that "consequently the defendant was not guilty under the indictment as drawn." Whether petitioner abandoned his intention to rob was the only factual issue of any importance upon which there was any conflict in the evidence, and the jury's finding thereon was left undisturbed by two courts (cf. *Delaney* v. *United States*, 263 U. S. 586, 589–590). Petitioner was satisfied to leave the determination of this issue to the jury, for he did not question the sufficiency of the evidence at the end of the Government's case or at the end of all the evidence. Moreover, he made this issue pivotal in the prayers he submitted for instructions. (See, particularly, prayer No. 8 (R. 48), which was granted.)

U. S. GOVERNMENT PRINTING OFFICE: 1942